Filed 5/17/10 Bain v. Tax Reducers CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

HAROLD C. BAIN, Plaintiff and Respondent, v. TAX REDUCERS, INC., Defendant and Appellant.	H033632 (Santa Clara County Super. Ct. No. CV112065)

Defendant and appellant Tax Reducers, Inc. (Tax Reducers) appeals the trial court's order denying its special motion to strike plaintiff and respondent Harold Bain's complaint as a strategic lawsuit against public participation. (Code Civ. Proc., § 425.16.)[1]

In a previous action, Bain filed a claim against Tax Reducers with the Labor Commissioner for unpaid wages. The Labor Commissioner found in favor of Bain. Tax Reducers appealed that ruling to the superior court and, as required by Labor Code section 98.2, subdivision (b), posted a bond with the court in the amount of the Labor Commissioner's award. The parties settled the court action in a judicially supervised

[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

proceeding. The terms of the settlement provided for the immediate release of the bond funds to Tax Reducers. After the bond was released, the parties entered into a dispute over the terms of the written release memorializing their settlement agreement. Since the underlying action had been dismissed, Bain sued Tax Reducers in the instant action asserting five causes of action related to his wage claim, the settlement, and the bond. Tax Reducers' special motion to strike challenged two of Bain's causes of action.

Independently reviewing the ruling on the special motion to strike, we conclude that the trial court did not err when it denied the special motion to strike. Accordingly, we will affirm the trial court's order.

FACTUAL AND PROCEDURAL HISTORY

I. Underlying Action

Bain filed a complaint against Tax Reducers with the California Division of Labor Standards Enforcement seeking $7,700 in wages for work performed in 2005 as an employee of Tax Reducers. The briefs suggest the parties disputed whether Bain was an employee or an independent contractor. The Labor Commissioner found in favor of Bain, awarding him $14,109.[2]

In May 2006, Tax Reducers appealed[3] the Labor Commissioner's ruling to the superior court in *Bain v. Tax Reducers, Inc.*, Santa Clara County Superior Court Case No.

---

[2] The record does not disclose the amount of the Labor Commissioner's award. However, Labor Code section 98.2, subdivision (b) provides that "[w]henever an employer files an appeal pursuant to this section, the employer shall post an undertaking with the reviewing court in the amount of the [Labor Commissioner's] order, decision, or award." According to Bain's first amended complaint, Tax Reducers posted "the requisite bond in the approximate sum of $14,109." We therefore infer that the amount of the Labor Commissioner's award was $14,109.

[3] Although labeled an "appeal," the proceedings in the superior court result in a trial de novo, in which the decision of the Labor Commissioner is not entitled to any weight. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1115-1116.)

1-06-CV063080. Upon filing its appeal, Tax Reducers posted a $14,109 bond with the court pursuant to Labor Code section 98.2.

On December 11, 2006, the parties entered into a judicially supervised settlement. Counsel for Tax Reducers recited the terms of the settlement agreement into the record as follows: "Parties stipulate, of course, this is a judicially supervised settlement. Case will be settled by the defendant making a total payment of $17,700. The parties will provide mutual general releases including 1542 releases to the parties and the officers, employees, attorneys, agent, etc., anyone, anyone acting on behalf of either of the parties. [¶] The third item is we're stipulating to an order for the immediate release of the bond that is on file with the court in approximately value a [*sic*] $14,109 and if we could get that today, that would be appreciated. [¶] The defendant will make a payment . . . by January 31, 2007 of $10,000 to [Bain's counsel's] law firm, $7,700 to Mr. Bain. The amounts paid will be done without deduction for taxes or withholdings. And Mr. Bain will indemnify the company against any tax claims. [¶] The final item is that the company agrees that if they are contacted and requested to confirm Mr. Bain's having worked there, the company will confirm that Mr. Bain worked with the company in January and February of 2005 and that he was paid $1,100 a week." Bain's counsel confirmed on the record that the terms were "accurate" as recited. Both Bain and the president of Tax Reducers told the court that they were willing to be bound by those terms.

The court instructed counsel on the procedure to be followed to obtain prompt release of the funds on deposit with the court and set the matter for "dismissal review" on February 8, 2007. The court advised the parties that there would be no need to appear at that time if a dismissal was on file.

The following day, on December 12, 2007, the court signed an order releasing the funds on deposit with the court to Tax Reducers. Presumably because of interest, the amount on deposit had increased to $15,105.86. The order stated "[t]hat the parties have settled the litigation and stipulated to release of the deposited funds to [Tax Reducers]."

Thereafter, Tax Reducers sent Bain a proposed release for his signature. Bain refused to sign the release and asserted that the release "did not comport with" the terms agreed to at the judicially supervised settlement conference. Later, Bain sent Tax Reducers a proposed release, which he alleges, "mirrored all of the terms agreed to at the . . . judicially supervised settlement" conference. Tax Reducers refused to sign that release. Since that time, neither party has executed a written release. The record does not contain copies of the parties' proposed releases and the nature of the dispute over the written release is not clear. The record suggests that at one time Bain refused to sign any kind of written release. The releases were not placed in evidence as part of the special motion to strike in this case.

Neither party asked the court to retain jurisdiction to enforce the settlement agreement and the previous action was dismissed "on or about February 8, 2007." The record does not indicate whether the case was dismissed pursuant to a party's written request for dismissal or whether it was dismissed by the court at the dismissal review hearing.

II. The Instant Action

A. Bain's Original Complaint

In May 2008, Bain filed a new complaint "to Enforce Judicially Supervised Settlement," entitled *Bain v. Tax Reducers, Inc.*, Santa Clara County Case No. 1-08-CV-112065. The complaint set forth facts related to the wage claim and the settlement of the underlying action and asserted five causes of action for: (1) enforcement of a judicially supervised settlement; (2) breach of contract; (3) a common count for money had; (4) violations of the Labor Code, including Labor Code section 98.2; and (5) conversion of the bond money. Bain's cause of action for conversion asked for punitive damages.

B. Tax Reducers' Demurrer and Cross-Complaint

Tax Reducers filed a demurrer, arguing that Bain was not entitled to specific performance and that his breach of contract claim failed because Bain had not alleged that he had performed all of his obligations under the settlement agreement. Tax Reducers argued that a common count theory could not be used to enforce an express contract. It attacked the fourth cause of action for Labor Code violations on three grounds: res judicata, the statute of limitations, and estoppel. With regard to the fifth cause of action for conversion, Tax Reducers argued that the bond was not Bain's property, that Bain had consented to the release of the bond money, and that Tax Reducers had not violated Labor Code section 98.2.

Tax Reducers also filed a cross-complaint against Bain for breach of contract. The cross-complaint alleged that the parties had first settled the underlying action in July 2006 for $9,791 and that Bain subsequently refused to sign a general release and said he would only sign a limited release.

In his opposition to the demurrer, Bain argued that he was not required to sign a written release because the "parties never agreed to reduce their judicially supervised settlement to writing," that the settlement agreement did not require a written release, and that there is no legal authority that such a writing is necessary. He asserted that both parties had prepared releases, neither of which had been signed. He argued that under Labor Code section 98.2, the bond is deposited for the benefit of the employee and that when Tax Reducers took the bond, it took his wages.

The court overruled the demurrers to the first through fourth causes of action and sustained the demurrer to the fifth cause of action (conversion) with leave to amend, stating that Bain had not adequately alleged his right to possess the bond proceeds at the time of the alleged conversion.

C. Bain's First Amended Complaint

Bain filed a first amended complaint in July 2008. The allegations of the first amended complaint (the operative pleading) were identical to those in the original complaint, except Bain added allegations that he had an ownership interest in the bond at the time of its conversion.

D. Tax Reducers' Special Motion to Strike

In response to the first amended complaint, Tax Reducers filed a special motion to strike the fourth and fifth causes of action as a strategic lawsuit against public participation (SLAPP), otherwise known as an anti-SLAPP motion. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57 (*Equilon*).) Tax Reducers argued that both the fourth and fifth cause of action were barred by the litigation privilege (Civ. Code, § 47) since they were both based on the release of the bond.[4] Tax Reducers asserted that making motions to a court and obtaining orders from a court during a lawsuit is absolutely privileged, that any oral or written statements in the underlying litigation were protected, and that requesting and obtaining a court order for the release of the bond was privileged.

Tax Reducers also filed a special demurrer to the first cause of action on the grounds of uncertainty. Tax Reducers does not appeal the ruling on the special demurrer and copies of the papers related to that demurrer are not in the record on appeal.

Bain opposed the anti-SLAPP motion, arguing that it was "another delay tactic." He argued that Tax Reducers refused to pay the settlement agreement, then failed to forfeit the bond money to Bain. He argued that he was not trying to interfere with anything Tax Reducers said in court and merely wanted to enforce the settlement

[4] As noted previously, the fourth cause of action alleged various breaches of the Labor Code, including that Tax Reducers "has further violated Labor Code §98.2(b) by causing this court to release the bond deposited by [Tax Reducers], without complying with the terms of Section 98.2(b)."

agreement. He also argued that the litigation privilege does not apply to a contract action for breach of a settlement agreement. Bain did not present any evidence in support of his opposition to the motion, other than the order on the demurrer to the original complaint and declarations of his counsel supporting his claim for attorney fees.

In reply, Tax Reducers argued that the anti-SLAPP statute covers more than speech and includes any act that furthers a person's right to petition, including written actions and other conduct in a lawsuit. Tax Reducers agreed that the litigation privilege does not apply to the wage claim or the breach of contract claim and reminded the court that the motion only challenged the claims for conversion and the Labor Code violations. Both sides requested attorney fees and costs related to the motion.

The court overruled the special demurrer and denied the special motion to strike. With regard to the special motion to strike, the court was "somewhat perplexed by the motion." The court agreed with Bain's opposition that the first amended complaint was "not attacking any protected activity of the defendant outside of those attacks that are allowed by law in a lawsuit" and stated that Bain "is appropriately suing for wages." The court stated that the "loss of the security bond is really incidental" to the lawsuit and held that Tax Reducers had "not met its burden [of] establishing that the conduct arose from defendant's exercise of a protected activity."

DISCUSSION

We begin our assessment of the parties' contentions by setting forth the general principles that inform our analysis. We then apply those principles to the case at hand.

I. General Principles

Strategic lawsuits against public participation are commonly referred to by the acronym "SLAPP." (*Equilon, supra,* 29 Cal.4th at p. 57.) SLAPP suits arise from constitutionally protected speech or petitioning activity and lack even minimal merit.

(*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055 (*Rusheen*).)

A. The Statute

In 1992, the Legislature responded to the "disturbing increase" in such suits by enacting section 425.16. (§ 425.16, subd. (a); *Rusheen, supra*, 37 Cal.4th at pp. 1055-1056.) The statute incorporates the Legislature's express declaration "that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (§ 425.16, subd. (a).) In 1997, the statute was amended to clarify the Legislature's intent that "this section shall be construed broadly." (*Ibid.*; *Equilon, supra,* 29 Cal.4th at p. 60.)

The statute furnishes a mechanism for quickly identifying and eliminating suits that chill public participation: a special motion to strike, which, as noted before, is commonly called an "anti-SLAPP motion." The statute provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) The anti-SLAPP motion permits the trial court to evaluate the merits of a possible SLAPP "using a summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192 (*Varian*).) Under the procedure authorized by section 425.16, a defendant can stay discovery before litigation costs mount, obtain early dismissal of the lawsuit, and recover attorney's fees. (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 197-198.)

The statutory motion to strike may be granted as to one or more causes of action, rather than the entire pleading. (§ 425.16, subd. (b)(1).) This is particularly appropriate

in cases where the "claims are not factually or legally intertwined." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1004 (*ComputerXpress*).) The challenged cause of action may appear in a complaint, in a cross-complaint, or in other pleadings. (§ 425.16, subd. (h); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77 (*Cotati*).)

B. Two-Pronged Analysis

A special motion to strike triggers a two-step process in the trial court. (*Equilon, supra*, 29 Cal.4th at p. 67; *Navellier*, *supra*, 29 Cal.4th at p. 88.) "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity." (*Cotati*, *supra*, 29 Cal.4th at p. 76, quoting § 425.16, subd. (b)(1).) "If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Cotati*, at p. 76; § 425.16, subd. (b)(1).) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute – i.e., that arises from protected speech or petitioning *and* lacks even minimal merit – is a SLAPP, subject to being stricken under the statute." (*Navellier*, *supra*, 29 Cal.4th at p. 89; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278-279 (*Soukup*).)

In each part of the two-step process, the party with the burden need only make a threshold, prima facie showing. (*Cotati, supra*, 29 Cal.4th at p. 76.) In assessing each party's showing, the court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

1. First Prong: Acts Arising From Protected Activity

The court first considers whether the action is one arising from protected activity. It is the defendant's burden to show that the challenged cause of action falls within the statute. (*Equilon*, *supra*, 29 Cal.4th at p. 66; *ComputerXpress*, *supra*, 93 Cal.App.4th at p. 1006.)

"As courts applying the anti-SLAPP statute have recognized, the 'arising from' requirement is not always easily met." (*Equilon, supra,* 29 Cal.4th at p. 66.) The conduct at issue must fall within one of the four categories set forth in the statute. (*Ibid.*, citing § 425.16, subd. (e).) The statutory definition of an " 'act in furtherance of right of petition or free speech' " includes "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

When the defendant's alleged acts fall under subdivisions (e)(1) or (e)(2) of section 425.16, defendant is not required to make a separate showing that the matter is "an issue of public interest," as is necessary under subdivisions (e)(3) and (e)(4). (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113-1123 (*Briggs*).) This is because the concept of what constitutes a public issue is deemed to include speech activity that takes place before, during, or in connection with an "official proceeding authorized by law." (§ 425.16, subd. (e)(1), (e)(2); *Briggs,* at pp. 1116-1117.)

As case law makes clear, "the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute." (*Navellier, supra,* 29 Cal.4th at p. 89.) "In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Ibid.*)

2. Second Prong: Probability of Prevailing

If the defendant's showing satisfies the first prong of the analysis, the court proceeds to the second step, a determination of the plaintiff's probability of prevailing on the merits. (§ 425.16, subd. (b)(1); *Cotati*, *supra*, 29 Cal.4th at p. 76.) The plaintiff has the burden of showing such a probability. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713.) To carry that burden, the plaintiff must state and substantiate a legally sufficient claim. (*Id.* at pp. 713-714.)

"In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)) . . . ." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (*Wilson*), superseded by statute on another point as stated in *Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 547-550.) The court does not weigh the evidence or assess its probative value. (*Wilson*, at p. 821; *Taus v. Loftus*, *supra*, 40 Cal.4th at p. 714.) Rather, the court accepts as true the evidence favorable to the plaintiff. (*Soukup*, *supra*, 39 Cal.4th at p. 291.) The court measures the plaintiff's showing against a standard similar to that used in deciding a motion for nonsuit, directed verdict, or summary judgment. (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1010; *Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017; see *Varian*, *supra*, 35 Cal.4th at p. 192.) "The plaintiff need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP." (*Soukup*, at p. 291.) But the court "should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Wilson*, at p. 821; *Taus v. Loftus*, at p. 714.)

C. Standard of Review

On appeal, we review the entire record de novo to determine, first, whether the defendant has made the requisite initial showing that the plaintiff's action arose from protected activity, and, if so, whether the plaintiff has demonstrated a reasonable

probability of success. (*Soukup, supra,* 39 Cal.4th at p. 269, fn. 3; *Rusheen, supra,* 37 Cal.4th at p. 1055.)

II. Analysis

As we now explain, Tax Reducers failed to satisfy the first prong of the two-part analysis, which requires a threshold showing that the challenged claims arose from protected activity. We shall review Tax Reducers' challenges to Bain's fourth and fifth causes of action separately. We begin with the fifth cause of action for conversion.

A. Fifth Cause of Action for Conversion

Tax Reducers argues that its actions in requesting and obtaining a court order for release of the bond funds is protected activity under the anti-SLAPP statue and the absolute litigation privilege in Civil Code section 47. It argues that both the fourth and fifth causes of action, which seek to impose liability on Tax Reducers for obtaining release of the bond funds, fail because making motions and obtaining orders from the court during a lawsuit are absolutely protected by the litigation privilege and because Bain consented to the release of the funds.

1. Protected Activity and the "Arising From" Requirement

At issue in the first prong of the analysis is "whether the plaintiff's cause of action actually *arose from* the assertedly protected activity, and . . . whether the activity *was in fact* protected." (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479.)

Tax Reducers argues that its conduct (requesting and obtaining an order for release of the bond funds) was a protected activity because section 425.16, subdivision (e)(1) expressly provides that any oral or written statement made in a judicial proceeding is a protected activity.

As noted previously, under section 425.16, subdivision (e)(1), an " 'act in furtherance of right of petition or free speech' " includes "(1) any written or oral

statement or writing made before a . . . judicial proceeding, ..." Unquestionably, the constitutional right to petition includes the "basic act" of filing suit. (*Briggs, supra*, 19 Cal.4th at p. 1115; accord, *Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1397-1398.) Petition rights also include "communicative conduct such as the filing, funding, and prosecution of a civil action." (*Rusheen, supra*, 37 Cal.4th at p. 1056.)

As our high court has explained, however: "That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such." (*Cotati, supra*, 29 Cal.4th at p. 78.) Thus, "the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute." (*Navellier, supra*, 29 Cal.4th at p. 89; accord, *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc*. (2008) 164 Cal.App.4th 1108, 1116 (*Applied Business*).) In assessing the threshold showing, "the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier, supra*, 29 Cal.4th at p. 89.) A "cause of action that *arises from* a defendant's protected actions is synonymous with a cause of action that is *based on* the defendant's protected actions. . . ." (*Applied Business, supra*, 164 Cal.App.4th at p. 1116.)

"In deciding whether the 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability . . . is based.' " (*Cotati, supra*, 29 Cal.4th at p. 79, citing § 452.16, subd. (b).) The analysis turns on whether the conduct that "forms the basis for the plaintiff's cause of action" was "*itself* . . . an act in furtherance of the right of petition or free speech." (*Equilon, supra*, 29 Cal.4th at p. 66, internal quotation marks omitted.) "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to [its] asserted liability – and whether that activity constitutes protected speech or petitioning." (*Navellier, supra*, 29 Cal.4th at p. 92.)

Courts thus "need to examine the specific acts of wrongdoing" alleged in the challenged pleading to determine whether they constitute protected activity. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 671 (*Peregrine*).) Because the allegedly wrongful conduct "may also fall within the class of constitutionally protected speech or petitioning activity, a court considering a special motion to strike must examine the allegedly wrongful conduct itself, without particular heed to the form of action within which it has been framed." (*Ibid.*) Courts thus "focus on the specific nature of the challenged protected conduct, rather than generalities that might be abstracted from it." (*Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279.)

2. Whether Conduct At Issue Was Protected Activity

Bain's conversion claim alleges that Tax Reducers: (1) "requested and received the release of the bond"; (2) "took back its deposit from" [the court]; (3) "failed and refused" to pay the settlement sums by January 31, 2007; (4) "wrongfully exercised dominion over, and converted, the bond proceeds to its own use"; and (5) "failed to return" the bond, "which by law, is kept as an undertaking to protect Bain's wages." Bain alleges that his "right to possess the bond proceeds accrued to him on or about February 10, 2007, or 10 days after January 31, 2007 when the bond proceeds were to be forfeited to him" and that "the bond proceeds could not be forfeited to BAIN because TAX REDUCERS, INC. had already obtained release of the bond proceeds."

Bain relies on Labor Code section 98.2, subdivision (b), which provides in relevant part: "The undertaking shall be on the condition that, if any judgment is entered in favor of the employee, the employer shall pay the amount owed pursuant to the judgment, and *if the appeal is* withdrawn or *dismissed without entry of judgment, the employer shall pay the amount owed pursuant to the order, decision, or award of the Labor Commissioner* unless the parties have executed a settlement agreement for payment of some other amount, in which case the employer shall pay the amount that the

employer is obligated to pay under the terms of the settlement agreement. *If the employer fails to pay the amount owed within 10 days of* entry of the judgment, *dismissal,* or withdrawal *of the appeal,* or the execution of a settlement agreement, *a portion of the undertaking equal to the amount owed, or the entire undertaking if the amount owed exceeds the undertaking, is forfeited to the employee*." (Italics added.)

Tax Reducers' brief focuses on the allegations related to its conduct in requesting and obtaining release of the bond money, which we agree was protected activity. Bain does not argue otherwise. However, Tax Reducers does not mention, much less discuss, the remaining allegations of the fifth cause of action: (1) that it failed and refused to pay the settlement; (2) that it wrongfully exercised dominion over the bond money after the settlement fell apart; and (3) that it failed to return the bond to the court. These allegations relate to matters that occurred after the case was settled and dismissed. The question then becomes whether this conduct was also protected activity.

Applied Business is instructive. In *Applied Business,* a software licensor sued a licensee in federal court alleging copyright infringement and other causes of action. The parties entered into a settlement agreement that provided that the defendant would pay the plaintiff $50,000, that the defendant would stop using the plaintiff's software, and that the defendant would certify that it had returned all of the copies of the software to the plaintiff. (*Applied Business, supra,* 164 Cal.App.4th at pp. 1111-1112.) The plaintiff subsequently sued the defendant in state court alleging breach of the settlement agreement and specific performance, based on the defendant's alleged failure to provide the certification called for in the settlement agreement and alleged continued use of the software. (*Id.* at pp. 1114, 1117.) The appellate court held that "[n]either of those alleged actions by the defendant can reasonably be said to have been taken by defendant in furtherance of its right of petition or free speech in connection with a public issue. Therefore, it cannot reasonably be said that [the] plaintiff's complaint arises from/is based on protected activities undertaken by the defendant. . . . This is a breach of

contract suit based solely on defendant's alleged failure to comply with specific provisions in the settlement agreement." (*Id.* at p. 1117.) The court explained, "Here, the gist of plaintiff's complaint is not that defendant did something wrong by acts committed during the course of the underlying federal action, but rather that defendant did something wrong by breaching the settlement agreement after the underlying action had been concluded. Under the explanatory provisions in subdivision (e) of section 425.16, defendant's entering into the settlement agreement during the pendency of the federal case was indeed a protected activity, but defendant's subsequent alleged breach of the settlement agreement after the federal case was concluded is not protected activity because it cannot be said that the alleged breaching activity was undertaken by defendant in furtherance of defendant's right of petition or free speech, as those rights are defined in section 425.16. Thus, the instant suit is based on alleged conduct of the defendant that is not protected activity." (*Id.* at p. 1118.)

Similarly, in this case, the gist of Bain's complaint is not that Tax Reducers did something wrong by acts committed during the course of the underlying action, but rather that it did something wrong after the underlying action had been concluded: it refused to pay the settlement, it wrongfully exercised dominion over the bond money after the settlement fell apart, and it failed to return the bond to the court. In our view, as in *Applied Business*, this was not protected activity.

3. Mixed Activity

Since the fifth cause of action alleges both protected and unprotected activity, we turn to the rules that govern cases involving mixed activity. As in *Peregrine*, "[c]onsidering the variety of wrongful acts alleged, the causes of action at issue in this case are mixed in that they are based on both protected and unprotected activity." (*Peregrine, supra,* 133 Cal.App.4th at p. 672.) Several appellate decisions have considered whether the anti-SLAPP statute applies to such mixed causes of action. "The

apparently unanimous conclusion of published appellate cases is that 'where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is "merely incidental" to the unprotected conduct.' " (*Ibid.*, citing *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103 (*Mann*); *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228; and *Martinez v. Metabolife International* (2003) 113 Cal.App.4th 181, 188 (*Martinez*).) "As one court explained, 'if the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion. [Citation.]' [Citation.] But if the allegations concerning protected activity are more than 'merely incidental' or 'collateral,' the cause of action is subject to a motion to strike." (*Peregrine*, at p. 672, citing *Mann*, *supra*, 120 Cal.App.4th at pp. 103-105.) Put another way, "when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez*, *supra*, 113 Cal.App.4th at p. 188.)

Some cases that apply the " 'merely incidental' " test to determine whether section 425.16 applies also assert that " 'it is the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies.' " (*Peregrine*, *supra*, 133 Cal.App.4th at pp. 672-673; *Episcopal Church Cases* (2009) 45 Cal.4th 467, 477 [applying gravamen or principal thrust test]; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 728 ["The allegations of plaintiffs' complaint assist us in determining whether the principal thrust or gravamen of the causes of action is protected petitioning activity"].) The trial court relied on this formulation of the test in determining that the causes of action at issue here did not arise from protected activity.

Tax Reducers argues that the gravamen or principal thrust test does not apply to this case because Bain's fifth cause of action seeks more than contract damages and

wages. It observes that in addition to his claims for $7,700 in wages and $17,700 under the settlement agreement, Bain claims three additional types of damages: (1) a " 'right to the possess the bond proceeds' of approximately $14,109"; (2) compensatory damages for "the time and money 'expended in pursuit of the converted property' "; plus (3) punitive damages. Tax Reducers then recites the same rules that we have from *Peregrine* regarding allegations of protected activity that is merely incidental and collateral and argues that since Bain's cause of action for conversion claims the three additional measures of damages set forth above, his claims "are not 'merely incidental' to a claim related to unprotected activity." However, Tax Reducers misses the main point from *Peregrine* and the cases cited therein. In determining whether the complaint alleges protected or unprotected activity, the analysis focuses on the nature of the alleged wrongful conduct, not the type of damages claimed.

Here, we conclude, the gravamen of the fifth cause of action is Tax Reducers' conduct in breaching the settlement agreement and not restoring the bond after the settlement agreement fell through. (See *Applied Business*, *supra*, 164 Cal.App.4th at p. 1118 ["the gist of plaintiff's complaint is not that defendant did something wrong by acts committed during the course of the underlying federal action, but rather that defendant did something wrong by breaching the settlement agreement"]; *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 808 [the "alleged improper conduct does not arise from . . . petitioning activities" but instead from defendant's "conduct in carrying out its contractual duties"].) As stated previously, this was not protected activity. We therefore conclude that the trial court did not err when it denied the anti-SLAPP motion with regard to the fifth cause of action for conversion.

B. Fourth Cause of Action for Labor Code Violations

Bain's fourth cause of action for violations of the Labor Code alleges that Tax Reducers failed to pay wages since 2005 and that as a result of that failure to pay wages,

Bain is entitled to (1) $7,700 in liquidated damages under Labor Code section1194.2, (2) a penalty of $6,600 pursuant to Labor Code section 203; (3) interest (Lab. Code, § 1194.2); and (4) reasonable attorney fees and costs of suit (Lab. Code, § 1194.2). The fourth cause of action also alleges in paragraph 36 that Tax Reducers violated Labor Code section 98.2, subdivision (b) "by causing th[e] Court to release the bond . . . , without complying with the terms of Section 98.2(b)."

Tax Reducers argues that its anti-SLAPP motion was directed only at paragraph 36 of the fourth cause of action and asks this court to strike paragraph 36 of the first amended complaint.

Section 425.16 provides that an anti-SLAPP motion lies against a "cause of action" or a "claim" arising from protected speech or petitioning activity. (§ 425.16, subds. (b)(1) and (b)(3).) Pursuant to the plain wording of the statute, an anti-SLAPP motion applies to entire causes of action and cannot be used to attack or strike specific allegations or paragraphs in a complaint. (*Lauter v. Anoufrieva* (2009) 642 F.Supp.2d 1060, 1109 ["Anti-SLAPP motions challenge particular causes of action rather than individual allegations or theories supporting a cause of action"].

Like the fifth cause of action, the fourth cause of action alleges mixed conduct including both protected activity (obtaining release of the bond) and unprotected activity (the failure to pay wages). However, the gravamen of the fourth cause of action is Tax Reducers' alleged failure to pay wages and Bain's assertions that he is entitled to various forms of damages as a result of the failure to pay wages. It appears the drafter of the complaint included the allegation that Tax Reducers violated Labor Code section 98.2 by obtaining release of the bond funds in this cause of action because that allegedly wrongful conduct, like the failure to pay wages, alleges a violation of the Labor Code. Tax Reducers does not dispute that Bain should be allowed to state a cause of action based on the alleged failure to pay wages. In our view, the wage dispute, and not any protected activity, is the "gravamen or principal thrust" of the fourth cause of action. The

fact that protected activity is also alleged is merely incidental to the wage claim and does not transform this wage dispute into a SLAPP suit.

For all these reasons, we conclude that the trial court did not err when it denied the anti-SLAPP motion with regard to the fourth cause of action for violations of the Labor Code.

III. Conclusion

Because Tax Reducers has not made a threshold showing that the challenged causes of action were based on protected activities, the burden of showing a probability of prevailing on his claims never shifted to Bain. We therefore have no need to discuss the second prong of section 425.16 or Tax Reducers' arguments addressing the second prong. (*Applied Business*, *supra*, 164 Cal.App.4th at pp. 1118-1119.)

DISPOSITION

The October 8, 2008 order denying the special motion to strike is affirmed.

_____

McAdams, J.

WE CONCUR:

_____

Mihara, Acting P.J.

_____

Duffy, J.